78-147

IN THE

Supreme Court of the United States

October Term, 1978

No [redacted]

DENNIS CHAMPAGNE
Petitioner,

vs.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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INDEX

TABLE OF CASES

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To The Honorable, The Chief Justice, And The Associate Justices Of The Supreme Court Of The United States

The petitioner Dennis Champagne respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on May 5, 1978.

The opinion of the Court of Appeals (Mulligan and Meskill, Circuit Judges; Port, District Judge, sitting by designation) is unreported. There was no written opinion filed in connection with the district court proceedings.

STATEMENT OF JURISDICTION

The judgment and opinion of the Court of Appeals

sub-nom. **United States v. Dennis Champagne** from which review is sought, was entered on May 5, 1978 without written opinion.

The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Did Court err in denying Petitioner's Motion for Mistrial and allowing substitution of juror following retirement of the jury?

2. Did Court err in denying Petitioner's Motion to Dismiss?

I. THE PROCEEDINGS

On June 6, 1977, the Petitioner was indicted by a Grand Jury sitting in Hartford, Connecticut which indictment charged the Petitioner with violation of 26 USDC §5861(d) and 5871, Possession of a Firearm with a Silencer on April 13, 1977.

The Petitioner entered a Plea of Not Guilty in the Federal District Courtin Hartford, Connecticut.

The Petitioner filed a pre-trial motion to suppress evidence on July 11, 1977 claiming there was no probable cause for the issuance of the search warrant and filed briefs in support thereof. The Respondent filed a brief in opposition thereto and on November 11, 1977, United States District Court (Clarie, J.) filed its decision denying Petitioner's motion without opinion. On November 29, 1977 a trial commenced in Hartford and the jury returned a verdict of guilty on December 2, 1977 to the one count of

the indictment. On January 9, 1978, the Petitioner filed timely Notice of Appeal to the Court of Appeals hereinbefore described in the Statement of Jurisdiction.

II. STATUTES INVOLVED

(1) 26 USC §5861(d):

> "It shall be unlawful for any person . . . (d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record; . . ."

(2) 26 USC §5871

> "Any person who violates or fails to comply with any provision of this chapter shall, upon conviction, be fined not more than $10,000, or be imprisoned not more than ten years, or both, and shall become eligible for parole as a Board of Parole shall determine.

III. STATEMENT OF FACTS

On April 13, 1977 approximately five or six officers of the Connecticut State Police armed with a search warrant (7a)* issued by a Judge of the Superior Court for the State of Connecticut and searched premises known as Apartment 1004, 120 Huntington Turnpike in Bridgeport (15a, 16a, 17a). When the police officers opened the door Petitioner was found on the sofa lying face down. A gun was found in the top drawer of a desk. A silencer that is the subject matter of the indictment was also found in

*Page references followed by "a" refer to Petitioner's appendix in appeal.

the top drawer under a desk type hutch (18a). During the course of the search papers and notes were found in the kitchen area with the name "Red" on them. It was testified that Petitioner was known as Red (19a-23a). Testimony was offered that the silencer was not included in the control registry of the National Firearms Registration and Transfer Record as having been acquired by lawful making, transfer or importation by Dennis Champagne (24a-25a). Marvin S. Herndon, a firearms enforcement analyst, testified that the item assumed in the indictment was, in fact, a silencer (26a-38a).

The Petitioner claimed to have no knowledge that the silencer was in the apartment and that many other persons had equal access to Apartment 1004. Peter Giaguinto, the apartment house manager, testified that the lessee of Apartment 1004 was Debra Springs and a lease was prepared on her behalf (41a-44a).

Mildred Berry, a friend of the Petitioner, testified she saw him on an almost daily basis in Florida from early March 1977 to two days before the raid in Apartment 1004 and that as many as fifteen to twenty people would come in and out at any time (45a-49a). Linda Mariotti, also a friend of Petitioner, testified that she had seen as many as thirty people in and out of Apartment 1004 during the course of an evening some of whom had keys to the apartment (50a). In addition, Robert Erff, a friend of the Petitioner, testified that one Edward Correia, who was an informant for the Connecticut State Police, tried to sell him a silencer similar to the one which the Petitioner was charged with possessing for $200.00 in Apartment 1004 (51a). Thomas Martone testified

that a short time before the raid he knocked at Apartment 1004 and that the informant Correia told him he was staying in the apartment (52a).

REASONS FOR GRANTING THE WRIT

I. The Court Committed Error In Not Granting Repeated Motions For Mistrial And In Allowing Jury Substitution After The Jury Had Retired.

At 10:00 A.M. on Friday, December 2, 1977 the Court charged the jury. Immediately after the Court completed its charge to the jurors, Lois B. Gordon, the alternate juror was excused with the thanks of the Court (53a-54a). After the exceptions were made defense counsel brought to the Court's attention a highly prejudicial newspaper article that had appeared in The Hartford Courant on the same morning (14a). The article referred to the fact that thousands of pills had been confiscated and 30 pounds of marijuana had been found. The article also reported that a State Trooper heard a threat by an unidentified club witness against the witness Correia who was in the Witness Protective Service (55a). All of this had been excluded at trial. In fact, when the Government sought to introduce the search warrant that had reference to stolen goods and narcotics the Court excluded it saying:

> "...to put this other material in here, of stolen goods and drugs, I think this would be prejudicial and prejudice the case badly" (56a).

The Court then inquired of the jury if anyone had read the article in The Hartford Courant (57a). Juror

Champigny responded that he read the article but categorically denied discussing it with any members of the jury. Defense counsel moved for a mistrial at side bar and also asked that the jurors be questioned individually as to whether or not Champigny discussed it with any of them (58a). The Court asked each juror in the presence of each other whether Champigny discussed the case with them. Juror Archambault responded that Champigny mentioned a few things (58a). Juror Christensen said Champigny told her that he read the article (59a). Defense counsel in the absence of the jury again moved for mistrial and asked the Court to question the jurors individually. When summoned into chambers Juror Christensen said that Champigny told her there were a lot of things connected with the case — including dope. Juror Archambault when asked by the Court if Champigny told her anything answered "If he did I don't recall, because I blocked my ears" (60a). Juror O'Connor when questioned initially in chambers said she heard nothing that would in any way influence her but when asked further admitted she heard Champigny say there was quite a bit in the article and "they got **those fellows** (emphasis added) on a lot of things" (61a).

Defense counsel again moved for a mistrial on the basis that Champigny's statements had permeated the entire panel (62a) and that the alternate had already been excused by the Court. An hour and one half after the alternate was excused she was found by the U. S. Marshal and brought back and added to the jury panel. At 3:23 P.M. the same day the jury reported they could not reach a unanimous verdict. The jury after having been read a modified

Allen charge subsequently returned a guilty verdict.

Rule 24 (c) Federal Rules of Criminal Procedure provides that an alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider the verdict. The same rule also provides that alternate jurors . . . shall replace jurors who **prior** to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties.

According to **Ballantine's Law Dictionary** retirement of jury is defined as the jury proceeding to the jury room for their deliberation following the reception of evidence, arguments of counsel, and instructions by the Court.

The Court after excusing alternate Juror Gordon pronounced its last words "The Jury may now retire" (54a).

That an alternate juror cannot be included in any proceeding commenced by the jury after it has retired is clear. **United States v. Beasley**, 464 F.2d 468 (10th Cir.-1972). This is all the more apparent after the alternate has been discharged.

Assuming, arguendo, that the Court finds the definition of retirement of jury is taken too liberally since the Court instructed the jurors not to commence deliberations until the exhibits were brought in. The following two factors should be taken into account:

1. There is serious question as to whether or not the jurors could render a fair and just verdict

in view of Juror Champigny's comments that were heard by at least three jurors and referred to dope and **those fellows**. Jurors are reluctant to go into details of these type conversations because of the daily admonitions given by the Court. There was no reference to **dope** during the course of trial and the Court conceded the prejudicial effect this type of testimony would have when the government tried to introduce evidence of same.

2. The trial was of a relatively short duration. The transcript shows only 294 pages of testimony including argument and colloquy.

When the reason for the juror substitution is considered with the juror's substitution in and of itself it is strongly urged Petitioner did not have a fair trial. A mistrial should have been granted.

II. The Court Erred In Denying Petitioner's Motion To Suppress In That There Was No Probable Cause For The Issuance Of The Search Warrant.

A.

The Application For Search Warrant Must Establish Probable Cause For The Search On The Face Of The Warrant.

The Fourth Amendment to the United States Constitution requires that no warrants shall be issued except upon probable cause supported by oath. Connecticut statute requires the submission of a written affidavit to a judge to determine whether or not there is probable cause upon which to base a

warrant (C.G.S. §54-33(c)). The Judges shall issue such a warrant only if the affidavit demonstrates the **probability** (not possibility) that contraband will be found in the place specified to be searched. (**U. S. ex. rel. Denegris v. Menser**, 247 F. Supp. 826 (D. Conn. -1961); **Aguilar v. Texas**, 378 U.S. 108 (1964)). In ascertaining whether or not a search was legally conducted, pursuant to the probable cause requirement, attention must be focused solely upon the information contained on the face of the application. (**Spinelli v. United States**, 393 U.S. 410 (1969)). Extraneous information or successfulness of the search cannot be considered. If probable cause is not found to exist, then the fruits of said search must be excluded from evidence. (**Mapp v. Ohio**, 367 U.S. 652 (1961)).

B.

Information Supplied By An Informer Must Be Adjudged "Reliable" In Order To Establish Probable Cause.

A search warrant is valid only if it is issued upon probable cause (**Aguilar, supra**). Probable cause exists only when the facts presented to the judge give him reason to believe that they are reliable and that there are reasonable grounds to believe that seizable property is at the place to be searched (**Aguilar, supra**). Probable cause means more than mere suspicion (**Beck v. Ohio**, 379 U.S. 89 (1964)). While probable cause may, in fact, be based upon hearsay (**Jones v. United States**, 362 U.S. 257 (1960)), it may not be based upon hearsay (i.e. double hearsay) **United States v. Roth**, 391 F.2d 507 (7th Cir.-1967). Consequently when information is,

in fact, based on hearsay (i.e. from an informer), it must be examined carefully to assess both the accurady and the reliability of the facts presented to enforcement officers.

In order to establish the reliability of the information the Court must first examine the reliability of the informer, and second, the underlying circumstances by which the informant obtained the information, the so-called "two-pronged" test. (**Aguilar, supra; United States v. Spinelli,** 393 U.S. 410 (1969)). The two tests are independent of each other and must both be established in order to support a finding of probable cause. **U. S. v. Karathanos,** 531 F.2d 26 (2d Cir.-1976)). It is also clear that any strength in either of these prongs cannot buttress the other prong which is weak or non-exisstent. The Court in **Karathanos** easily found that the informant was reliable by virtue of the jeopardy the informant placed himself in in admitting to the commission of a crime. The complete lack of underlying circumstances, however, was held to be inadequate, as a matter of law and the Court never mentioned the reliability of the informant as a criterion to support or uplift the underlying circumstances prong. As to the undisputed independence of the tests, see also **Spinelli v. United States,** 393 U.S. 410, 415 (1968) and **United States v. Harris,** 403 U.S. 577, 578 (1971).

In order to justify reliance upon the informant's information, informant is "credible" or his information "reliable" (**Aguilar, supra**). Mere assertion in the affidavit that the informant is "reliable" is clearly not sufficient, by itself, to support a finding of reliability by the Court. (**State v. Penland,** 39 C.L.J. No.

27, at pp. 3-5 1978)). In **Aguilar,** the affidavit stated that "reliable information was received from a credible person", but the Court rejected the unsupported contention of reliability. In **Spinelli,** the Court felt the same stating: "(t)though the affiant swore that his confidant was 'reliable', he offered the magistrate no reason in support of this conclusion." (**Spinelli, supra,** at 416). The Court must analyze carefully what makes the informant reliable. It is clearly a question of degree. If an informant has given information frequently in the past that has led to many arrests and convictions then he may be considered more reliable than the person who has given little information and few convictions. The question of reliability must always be evaluated with a critical eye by the judge who, like defense counsel has (1) no access to the informant's identity, (2) no access to his criminal record unless he testifies, and (3) no way of verifying the assertion that information from the informant has led to prior convictions of others. Attacking this prong is usually an exercise in futility and it should be given less weight simply because of its nature. (See Hayes, Disclosure of Informers: **The Accused's Rights,** 48 Conn. B.J. 91 (1974)). This is especially true in this case where the affidavit admitted that the informant had given information leading to only one (1) conviction in the past. It is clear that this person was not a long time, numerously tested informant, and that substantial corroboration should have been attempted by investigating authorities. (See **Wong Sun v. United States,** 371 U.S. 471 (1963)).

It is well settled that in order to satisfy second prong, the underlying circumstances test, the informant must have personally observed the objects of the search on the premises of the defendant and not

himself relied on hearsay. (**Aguilar, supra; Roth, supra**). Without direct observation, even applications which allege an informer's tip coupled with allegations of independently gathered corroborating evidence are insufficient under the **Aguilar** rule. (**U. S. ex. rel. James Denegris v. Menser**, 360 F.2d 199 (CA 2 1966); **U. S. v. Marin**, 250 F. Supp. 507 (D. Conn. 1966)). Where the application does allege that a personal observation was made by the informant, then the Court must look at the underlying circumstances in order to satisfy the second prong of the **Aguilar-Spinelli** test. Allegations of personal observation are satisfactory only if they are at the very least accompanied by factual corroboration which lend credibility to the hearsay of the informant (**Penland, supra** at p. 4). There must be substantially more than bare allegation of observations. (cf. **United States v. Freeman**, 358 F.2d 459 (2d Cir. 1966); **United States v. Perry**, 380 F.2d 356 (2d Cir. 1967)). In **Freeman**, the affidavit alleged that the Defendant was seen by the informant selling **narcotics to several known addicts** (i.e. committing a criminal act in itself) (459 F.2d at 460). In **Perry**, the affidavit (a reproduction of which is not reported in the opinion) similarly alleged that the informant had witnessed sales over a two hour period (380 F.2d at 358). Such detail establishes the vantage point from which the reliable informant made his observation, and tends to confirm that the informant was probably not mistaken in what he observed. In the present case, there are no allegations of sales to known addicts or of sales over any period, or any other illustrative detail only the mere allegations that he "saw stolen property and drugs" in the Petitioner's apartment. This is not enough. The Second Circuit has required and continues to require some detail to

satisfy the underlying circumstances test (**United States v. Karathanos**, 531 F.2d 26 (2d Cir. 1976)). It is very apparent here that the underlying circumstances prong is not designated to again prove the integrity of the informant, but rather to ascertain some assurance that he actually saw what he thought he did. Specifically, since the information the magistrate is confronted with is hearsay, some detail must be provided to assure the magistrate that the information provided was not based on conjecture, or mistake. Mere allegations of observation of drugs, as in this case, without recitation of the circumstances accompanying the observation (such as observance during a sale) or the posture of the informant (such as a purchaser of the contraband as in **Aguilar**) are insufficient to dispel the possibilities of conjecture, mistake, and rumor, bred by hearsay information. (**Karathanos, supra**. See **Spinelli v. U.S.**, 393 U.S. 410 (1969)).

In the present case the defendant asserts that the application for the search warrant was illegally granted because the affidavit failed to state the circumstances under which the informant gathered his information. Particularly the affidavit claims that the informant was in the defendant's apartment and "saw stolen property and drugs." The remainder of the affidavit in no way supplements that bare conclusionary opinion. Particularly, it fails to state (1) under what circumstances the informant was in the apartment, (2) whether or not he had ever been there before and (3) how he was qualified to identify the property as "stolen" and the drugs as "controlled" drugs. Significantly, the affidavit fails to state(4) that any of his findings or information was corroborated by an independent police investigation or (5)

that the informant's statements were part of an ongoing police surveillance. The only "underlying circumstance" which was stated was that the informant was on the premises, an assertion which alone clearly does not satisfy the "underlying circumstance" test of **Aguilar**. In addition the affidavit in the present case even falls short of the approved affidavit in **Harris** in that it does not explain the reasons for the informant being on the premises (the affidavit in **Harris** claimed the informant was there to buy whiskey) or how the informant was qualified to identify the contraband (the informant in **Harris** had been taking the contraband for two years).

Finally, the bare statement of the informant falls short of the "intricate scenerio" approved in **Draper v. United States**, 358 U.S. 307 (1959). It is clear that the underlying facts supplied by the informant himself (i.e. where, when, and how he obtained this information) and corroborated by separate police investigation must be so detailed as to support inference of his personal knowledge. **(Draper, supra; Smith v. United States,**1 358 F.2d 833 (D.C. Cir.-1966)). The Supreme Court noted in **Spinelli, supra** that the scenario must be so specific as to be "...of the sort which is common experience may be recognized as being obtained in a reliable way..." 393 U.S. at 417-418. A generalized statement which can only lead to the inference that the information was bred by casual rumor or from the reputation of the specific defendant is clearly inadequate. **Aguilar, supra,** held that as a matter of constitutional law the word of an identified informant alone is not sufficient to establish probable cause if it is based on mere conclusions, suspicions or beliefs and contains no affirmative that the informant spoke with personal knowledge.

More crucial to the failure to prove probable cause in this case is the total lack of underlying corroborative information. Without independent police investigation which indicated that the information must fall before the "totality of circumstances" test of **Spinelli, supra.** In **Spinelli,** the FBI saw Spinelli going into an apartment with two (2) phones; they knew Spinelli to be a former bookie; and they had a tip from a reliable informant that Spinelli was accepting wagers. The Supreme Court overturned his conviction on the basis that, not only was there no evidence that the informer was in fact reliable nor the recitation of underlying facts as to who the informer obtained his information and, therefore unconstitutional under **Aguilar,** in addition there was no independent police investigation to corroborate some of the incriminating facts supplied by the informer. The Court noted that this independent investigation is essential to establishing probable cause and without it the warrant is constitutionally defective. In this case there was absolutely no separate police investigation to corroborate the information of the informer. Without the detailed ascertainment of the reliability of the specific information given, the approval of this affidavit constituted an invasion of the Petitioner's Fourth Amendment rights.

In the present case, the application fails to state allegations of any corroborating circumstances to support the informant's bare assertions. It states merely that "on April 18, 1972 the informant was in the Park Towers Apartments, No. 1004." There is alleged not one shred of information concerning how or why the informant gained access, or under what pretense he was there. There is alleged no corroborating evidence, independently gathered, that would

satisfy the minimum requirements of the above cases. As a matter of law, bare assertions that the informant was on the scene failed to lend sufficient credence to the application to support a finding of probable cause. As stated in **Spinelli**, the purpose of the two-prong test is to assure that the magistrate will function as something more than a rubber stamp, and will issue warrants only when the "reliable" informant's information has been issued to him in a reasonable reliable way, rather than through neighborhood gossip, conjecture, or mere suspicion. Consequently, the Petitioner's motion to suppress should have been granted.

CONCLUSION

Each of the issues presented herein poses important questions of federal criminal law which should be decided by this Court.

The writ of certiorari should be granted.

Wherefore, the Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the proceedings of that Court herein, being the case numbered and entitled in its Docket No. 78-1029 "**United States v. Dennis Champagne**" and that the judgment of that Court be reviewed as this Court may deem proper.

Dated this 23rd day of May, 1978.

DENNIS CHAMPAGNE
Petitioner
By HOWARD T. OWENS, JR., ESQ.
Attorney for Petitioner

OWENS & SCHINE
With him on the Petition.

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
For the Second Circuit

(Argued May 5, 1978 Decided May 5, 1978)
Docket No. 78-1029

United States of America,
Plaintiff-Appellee

—v.—

Dennis Champagne,
Defendant-Appellant

Before:

Mulligan, Meskill, *Circuit Judges;*
Port, *District Judge.*

Appeal from the United States District Court for the District of Connecticut. This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel. On consideration whereof, it is now hereby ordered, adjudged and decreed that the Judgment of said District Court be and it hereby is Affirmed in accordance with the Court's oral opinion in open court.

Howard T. Owens, Jr. of Bridgeport, Conn. (Stephen F. Donahue of Bridgeport, Conn. on the brief) for Appellant.

Richard Blumenthal, United States Attorney, New Haven, Conn. (Harold J. Pickerstein, Assistant United States Attorney, New Haven, Conn. on the brief) for Appellee.